(10) (11)

Nos. 98-791, 98-796

IN THE

Supreme Court of the United States

J. DANIEL KIMEL, JR., *et al.*,

Petitioners,

v.

FLORIDA BOARD OF REGENTS, *et al.*,

Respondents.

UNITED STATES OF AMERICA,

Petitioner,

v.

FLORIDA BOARD OF REGENTS, *et al.*,

Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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QUESTION PRESENTED

Does the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.*, compel States to surrender their Eleventh Amendment immunity and, if so, does it exceed Congress's enforcement authority under section 5 of the Fourteenth Amendment?

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STATEMENT

The Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 *et seq.*, does not permissibly require non-consenting States to submit to money-damages actions brought by individuals in federal court for at least two reasons. Congress failed to abrogate that immunity expressly, and at any rate lacked the power to do so under section 5 of the Fourteenth Amendment.

The States of Florida and Alabama do not make this claim lightly. The ADEA advances a commendable policy — non-discrimination against the elderly — and does so at the end of a lawmaking process that is as deserving of respect as each of the State lawmaking processes that it purports to displace. But, in this instance, the ADEA's attempted "expansion of Congress' powers" at the expense of a "corresponding diminution of State sovereignty," *Fitzpatrick v. Bitzer*, 427 U.S. 445, 455 (1976), would work a reallocation of the Federal-State balance that is neither necessary nor appropriate.

Not just Florida and Alabama, but all 50 States, have provisions of their own that permit age-discrimination claims against the sovereign. "[T]each[ing]" by their "example," *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting), the States have passed laws and administrative regulations that exceed the rational-basis requirements of equal protection review, *see Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 312-17 (1976) (per curiam); *Vance v. Bradley*, 440 U.S. 93, 98-112 (1979); *Gregory v. Ashcroft*, 501 U.S. 452, 470-73 (1991), and thus overprotect the constitutional rights of their elderly citizens. Nor in enacting the ADEA did Congress suggest anything to the contrary. It did not show, or even try to show, that the States have violated the constitutional rights of the elderly in the past or that they stand prepared to do so in the future.

On this record, Congress has no more "remedial" section 5 power, *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997), to re-define the constitutional rights of the elderly than it does to re-define the constitutional rights of the young. *See Oregon v. Mitchell*, 400 U.S. 112 (1970) (invalidating federal law reducing State voting-age requirements from 21 to 18). Accordingly, while States remain free to waive their sovereign immunity from age-discrimination claims on their own, just as all 50 States have done in their own tribunals under State law, *see* Appendix, and just as the Federal government has done in federal court under federal law, 29 U.S.C. § 633a(c), Congress has not abrogated, and cannot abrogate, the States' immunity for them.

1. History of State Age-Discrimination Laws.

Age-discrimination laws are a twentieth century innovation. Not until 1930, to our knowledge, did the first law of this type come into existence. It was a State law, and it specifically barred age discrimination by public employers. 1930 N.J. Laws ch. 104, § 1, p. 353 (codified as amended at N.J. Stat. Ann. § 52:14-11). Led by the example of New Jersey, other State legislatures soon followed course.

By 1974, 25 States had enacted such provisions, which by then applied to private and public employers alike. *See* Appendix. Then, as now, these State laws barred age discrimination in a variety of contexts (e.g., hiring, terms of employment, discharge), permitted injunctive and monetary relief, in some instances authorized punitive damages, and in most instances established separate civil rights commissions to ensure proper enforcement of these laws. *See* Appendix.

Today, all 50 States have age-discrimination provisions of one sort or another. *Id.* They cover most forms of public employment, and they all permit monetary relief against the sovereign. *Id.* Virtually all of them forbid the same practices

as the ADEA, and many of them offer more avenues of relief than the ADEA itself. *See* Appendix.

2. History of Age-Discrimination Claims Under the State and United States Constitutions.

Neither this Court nor a single one of the 50 State Supreme Courts has ever held that a State (or the Federal government) violated the equal protection requirements of the Fifth or Fourteenth Amendments by discriminating against the elderly through the exercise of its legislative or executive powers. In the three cases from this Court to address the issue, *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, *Vance v. Bradley*, 440 U.S. 93, and *Gregory v. Ashcroft*, 501 U.S. 452, the Court made clear that rational basis review governs such claims. Applying that highly deferential standard, the Court upheld the constitutionality of a Massachusetts statute requiring police officers to retire at age 50 (*Murgia*, 427 U.S. at 308, 314-17), a federal statute requiring foreign service officers to retire at age 60 (*Bradley*, 440 U.S. at 94-95), and a Missouri statute requiring judges to retire at age 70 (*Gregory*, 501 U.S. at 471-73).

While most States have equal protection provisions in their own Constitutions, and one State Constitution specifically bans discrimination on the basis of age, La. Const. art. I, § 3, just one State Supreme Court has found a violation of its Constitution in the context of age discrimination. In *Wilson v. Miwa*, 546 P.2d 1005 (Haw. 1976), the Hawaii Supreme Court found that a mandatory retirement plan for State university professors violated the Hawaii Constitution.

3. History of the ADEA.

Enacted in 1967, the ADEA initially covered just private sector age discrimination. It thus did not extend to federal employees, let alone State employees. Congress invoked its Interstate Commerce Clause powers in passing the law,

describing its "purpose" and "statement of findings" in the following manner:

> (a) (1) in the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs;
>
> (2) the setting of arbitrary age limits regardless of potential for job performance has become a common practice, and certain otherwise desirable practices may work to the disadvantage of older persons;
>
> (3) the incidence of unemployment, especially long-term unemployment with resultant deterioration of skill, morale, and employer acceptability is, relative to the younger ages, high among older workers; their numbers are great and growing; and their employment problems grave;
>
> (4) the existence in industries affecting commerce, of arbitrary discrimination in employment because of age, burdens commerce and the free flow of goods in commerce.
>
> (b) It is therefore the purpose of this Act to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment.

Pub. L. No. 90-202, § 2, 81 Stat. 602, (1967) (codified at 29 U.S.C. § 621). The 1967 Act also amended provisions of the Fair Labor Standards Act (FLSA) of 1938. *See* Pub. L. No. 90-202, § 7, 81 Stat. 604 (1967).

In 1974, Congress became the 26th legislature in the country to extend its age discrimination law to public employees. *See* Appendix. It did so through the Fair Labor Standards Amendments of 1974, which primarily amended substantive provisions of the FLSA. In the penultimate section of the 1974

Amendments, Congress extended the ADEA to most federal agencies (though not to itself) and to all 50 States. *See* Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, § 28(a)(2), 88 Stat. 74 (codified at 29 U.S.C. § 630(b)).

In making the ADEA applicable to the States in 1974, Congress did not invoke its remedial authority under section 5 of the Fourteenth Amendment. The text of the Act does not contain any claim, or even suggestion, that State governments had been or were about to violate the constitutional rights of their elderly citizens, let alone those as young as 40 years old. Nor does the legislative record. It contains no mention of section 5 and contains no findings or studies of any sort concerning State violations of the constitutional rights of the elderly.

Instead, the House and Senate Reports prepared in the course of enacting the 1974 Amendments invoke the watchwords of Interstate Commerce Clause authority, repeatedly referring to the impact of wage and employment laws on national commerce. According to the House Report, the law extends benefits "to workers engaged in commerce or in the production of goods for commerce, or employed in enterprises engaged in commerce or in the production of goods for commerce." H.R. Rep. No. 93-913, at 2 (1974). And according to the Senate Report, the "Committee believe[d] that there is no doubt that the activities of public sector employers affect interstate commerce and therefore that the Congress may regulate them pursuant to its power to regulate interstate commerce. Without question, the activities of government at all levels affect commerce." S. Rep. No. 93-690, at 24 (1974).

Very little of the 1974 Act, or the legislative debates that preceded it, even addressed the extension of the ADEA to government employees. The most commonly-expressed sentiment was this: "[E]mployees of State and local governments are entitled to the same benefits and protections in equal employment as the employees in the private sector of

the economy." 118 Cong. Rec. 15895 (1972) (statement of Sen. Bentsen) (quoting Senate Report). Just one of the 29 sections in the Act concerned the ADEA. *See* Pub. L. No. 93-259, § 28; *see also* 120 Cong. Rec. 8762-64 (1974). And even less of the legislative history occupied the subject. *See infra*.

In 1978, Congress expanded the protected class of employees from 40-65 to 40-70 and made it more difficult for employers to maintain mandatory age guidelines. The change, however, did not respond to unconstitutional State action, but apparently to this Court's 1976 decision in *Murgia* upholding a mandatory retirement age provision for police officers. According to a report issued by the House Committee on Aging: "If mandatory retirement because of age—the final step in the practice of age discrimination—is not to be declared unconstitutional by the Courts, then Congress should act to make such a practice illegal." House Select Comm. on Aging, 95th Cong., 1st Sess., *Mandatory Retirement: The Social and Human Cost of Enforced Idleness* 38 (Comm. Print 1977).

Today, the ADEA applies to employees over the age of 40 and no longer places a cap on the protected group at age 70. The law makes it unlawful for employers "to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. § 623(a)(1). And the law supplies a defense to employers who use age as a "bona fide occupational qualification reasonably necessary to the normal operation of the particular business." 29 U.S.C. § 623(f)(1). In attempting to comply with these requirements, an "employer cannot rely on age as a proxy for an employee's remaining characteristics, such as productivity, but must instead focus on those factors directly," *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 611 (1993), and the "rational basis standard" does not govern such inquiries, *Western Air Lines v. Criswell*, 472 U.S. 400, 420-23 (1985) (quotation omitted). The "policies and

substantive provisions of the Act apply with especial force in the case of mandatory retirement provisions." *Id.* at 410.

4. Factual Background.

Three sets of individual claimants filed these ADEA actions, two from the State of Florida and one from the State of Alabama. In each instance, claimants sought monetary relief against their State employers and did so in federal court.

a. *Kimel v. Florida Board of Regents.* In 1995, 36 professors and librarians employed by Florida State University (FSU) and Florida International University (FIU) brought a disparate impact claim against the Florida Board of Regents, invoking both the ADEA, 29 U.S.C. § 623(a)(1), and State law, Fla. Stat. ch. 760 App. 40-41, 45. The claims stemmed from a 1991 collective bargaining agreement which allegedly required the State to make certain market adjustments to faculty salaries to make them more "commensurate with their experience . . . when compared with employees more recently hired." App. 42. During the 1993-94 fiscal year, the legislature appropriated funds to the Florida Board of Regents that it could use in its discretion for this purpose. App. 43. The Board of Regents in turn left it to the discretion of each State university whether it would make the salary increases or allocate the money to other programs. App. 43. When FSU and FIU chose not to allocate the funds for faculty raises, plaintiffs sued, arguing among other things that it would have "a disproportionate impact on" them. App. 44. The Board of Regents filed a motion to dismiss on Eleventh Amendment grounds. In rejecting the motion, the Northern District of Florida, Tallahassee Division, held that the ADEA contained a clear abrogation of State immunity and was a permissible exercise of Congress's section 5 power. Pet. App. 57a-60a.

b. *Dickson v. Florida Dep't of Corrections.* In 1996, plaintiff Wellington Dickson filed an action in the Northern District of Florida, Panama City Division, against his

employer, the Florida Department of Corrections, and several of its officials. App. 83. Filed under the ADEA and the Americans with Disabilities Act, the complaint alleged, among other things, that the State had improperly denied him promotions to lieutenant and sergeant on account of age, then retaliated against him when he filed a grievance over the denied promotions. Plaintiff sought injunctive relief as well as compensatory and punitive damages. *See* App. 97-98. The Florida Department of Corrections filed a motion to dismiss on Eleventh Amendment grounds, which the district court rejected. Pet. App. 72a-75a.

c. *MacPherson v. University of Montevallo.* In 1994, two associate professors filed an ADEA claim against their State employer, the University of Montevallo. They alleged that the State university had denied them promotions to full professor, appropriate appointments to committee assignments, higher salary and sabbatical leave all on account of their age, and that the university maintained a salary and evaluation system that "has had a disparate impact on older faculty members." App. 22-25. Plaintiffs sought injunctive relief, including "promoting them to full professor," as well as compensatory damages. App. 25. The State filed a motion to dismiss on Eleventh Amendment grounds. The Northern District of Alabama granted the motion, concluding that the ADEA was not a proper exercise of Congress's enforcement authority. Pet. App. 64a-71a.

d. *Eleventh Circuit.* After consolidating the three appeals, the United States Court of Appeals for the Eleventh Circuit concluded that the ADEA does not abrogate the States' sovereign immunity.

While "believ[ing] good reason exists to doubt that the ADEA was (or could have been properly) enacted pursuant to the Fourteenth Amendment," Pet. App. 6a, Judge Edmondson chose to rest his decision on "the lack of unmistakably clear legislative intent" to abrogate the States' immunity, *id.* Merely

because the ADEA includes "the States as employers," he observed, "does not show an intent that the States be sued by private citizens in federal court — the kind of suit prohibited under the Eleventh Amendment." *Id.* at 11a. And that is particularly true here, he concluded, since the amendment permits an action against a State only in a court of "competent jurisdiction." *Id.* at 10a n.11 (quotation omitted). Under *Employees of the Department of Public Health and Welfare v. Missouri Public Health Department*, 411 U.S. 279, 281 (1973), he reasoned, "a federal court lacks 'competent jurisdiction' if the Eleventh Amendment prohibits the suits against the State." *Id.*

Judge Cox did not reach the clear-statement question. He instead concluded that "Congress lacks the constitutional authority to abrogate the states' Eleventh Amendment immunity to suit in federal court." *Id.* at 42a. In accordance with *City of Boerne v. Flores*, he concluded that "legislation enacted pursuant to § 5 must hew to the contours of Supreme Court-defined Fourteenth Amendment rights unless the legislation is a proportional response to a documented pattern of constitutional violation." *Id.* at 48a. The ADEA, he determined, did not meet that test. It is the "very essence of age discrimination" under the ADEA "for an older employee to be fired because the employer believes that productivity and competence decline with old age." *Id.* at 51a (quoting *Hazen Paper Co.*, 507 U.S. at 610). But under the Equal Protection Clause, he reasoned, the Supreme Court has upheld mandatory retirement laws that use age as a proxy for productivity — where "the policymaker's perception that mental acuity and physical stamina decline with age was rational basis enough to support the line between those under the retirement age and those over it." *Id.* at 50a (citations omitted). He also observed that "State action that has a disparate impact on old workers probably does not violate the Equal Protection Clause, but it can violate the ADEA." *Id.* at 51a (citations omitted). Chief

Judge Hatchett dissented from each of his colleagues' positions. *Id.* at 15a-41a.

SUMMARY OF ARGUMENT

I. In attempting to extend the ADEA to the States through the Fair Labor Standards Amendments of 1974, Congress failed to make its "intention to abrogate the States' immunity unmistakably clear in the language of the statute." *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 119 S. Ct. 2199, 2205 (1999). The ADEA's enforcement provision just permits individuals to bring actions against employers in "any court of competent jurisdiction," 29 U.S.C. § 626(c)(1), a jurisdictional phrase that *Employees of the Department of Public Health and Welfare v. Missouri Public Health Department*, 411 U.S. at 285, holds does not establish the "clear language that the constitutional immunity was swept away."

Nor does another provision of the ADEA — 29 U.S.C. § 626(b) — supply the missing specificity. It states that "[t]he provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures" of several parts of the FLSA. One such subsection provides that "[a]n action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction." 29 U.S.C. § 216(b). But the continued existence of two jurisdictional provisions — one in the ADEA itself (29 U.S.C. § 626(c)(1)) and another in the FLSA — by itself suggests that Congress did not mean to supplant the ADEA provision with the FLSA one. Any doubt on this score, moreover, is laid to rest by the specific language of the FLSA jurisdictional provision. By its terms, it just allows actions "prescribed in either of the preceding sentences," not one of which relates to an ADEA action. At most, anyway, this jurisdictional provision just amounts to "[a] general authorization for suit in federal court," which does not satisfy

the requirements of *Dellmuth v. Muth*, 491 U.S. 223, 231-32 (1989), or *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 246 (1985).

II. The ADEA also does not constitute permissible enforcement legislation under section 5 of the Fourteenth Amendment.

A. In purporting to "remedy" unconstitutional State discrimination against the elderly, *City of Boerne v. Flores*, 521 U.S. at 525, the ADEA does not proscribe what the Equal Protection Clause proscribes. Equal protection review in this setting receives rational basis scrutiny, compelling the rejection of such claims unless the government conduct "is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the legislature's actions were irrational." *Vance v. Bradley*, 440 U.S. at 97. ADEA claims, by contrast, receive judicial scrutiny that "is inconsistent with" and "significantly different" from "rational basis" review. *Western Air Lines v. Criswell*, 472 U.S. at 421-22. The ADEA thus cannot be sustained on core section 5 grounds — that it supplies a remedy or forum for vindicating constitutional violations.

B. The ADEA also cannot be sustained as a permissible exercise of Congress's conditional, prophylactic authority to prohibit what the Constitution does not.

1. The law, first of all, cannot be supported by a power that Congress never invoked. Because this prophylactic authority "imposes congressional policy on a State involuntarily, and because it often intrudes on traditional state authority," the Court has "not quickly attribute[d] to Congress an unstated intent to act under" it. *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 16 (1986). Having explicitly relied on its authority to regulate interstate commerce in passing the ADEA, 29 U.S.C. § 621(a)(4), and having given neither the States nor the Courts any indication (or warning) to

the contrary, Congress may not suddenly invoke its enforcement authority to sustain this law.

2. The law also lacks the necessary "predicate" "pattern or practice of unconstitutional conduct" for invoking this unique authority. *Florida Prepaid*, 119 S. Ct. at 2207 (quotation omitted). In passing the ADEA, Congress did not identify any pattern of unconstitutional State action, or for that matter even a single instance of such conduct.

Nor can such a record be contrived today. Not only are rational basis challenges "virtually unreviewable" as a matter of theory, *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 316 (1993), but as a matter of historical fact the Court at no time from 1868 to the present has found that the States violated these requirements. And on three occasions, the Court expressly rejected any such notion. *See Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307; *Vance v. Bradley*, 440 U.S. 93; *Gregory v. Ashcroft*, 501 U.S. 452. Add to this the fact that all 50 States currently regulate age discrimination by public employers in some manner, and it becomes clear that there is no tenable "evidence that unremedied [age discrimination] by States [has] become a problem of national import." *Florida Prepaid*, 119 S. Ct. at 2207-08.

3. But even if such a record could be established, the ADEA is "so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior." *City of Boerne*, 521 U.S. at 532. Consider the differences between judicial review of an ADEA claim and an equal protection one: (1) The ADEA requires individualized "case-by-case" determinations as to whether an elderly employee is qualified for the job, *Western Air Lines*, 472 U.S. at 411, not the "generalization" that "physical and mental capacity sometimes diminish with age," *Gregory*, 501 U.S. at 472; (2) the ADEA frequently places the burden of proof on States to justify their conduct, *Western Air Lines*, 472 U.S. at 416 n.24, not the

claimant, *Murgia*, 427 U.S. at 314; (3) the ADEA requires an "objective justification in a court of law," *Western Air Lines*, 472 U.S. at 419, not a "virtually unreviewable" justification (*Beach Communications*, 508 U.S. at 316) that could "reasonably be conceived to be true," *Bradley*, 440 U.S. at 111; (4) the ADEA frequently requires proof "that there is no acceptable alternative . . . with less discriminatory impact," *Western Air Lines*, 472 U.S. at 416 n.24 (quotation omitted), not the recognition that the State need not choose the "best means to accomplish this purpose," *Murgia*, 427 U.S. at 316. In the end, rather than being calibrated to correct rational-basis violations, the ADEA borrows the same framework and burdens associated with the heightened scrutiny applicable to discrimination claims based on race, gender or religion. The law, in this respect and many others, represents an impermissibly disproportionate exercise of section 5 authority.

C. Nor has the Court ever upheld a prophylactic exercise of section 5 power in the context of non-suspect classifications. Still less has it done so in the context of a record revealing no State violations as well as the existence of 50 State anti-discrimination provisions, half of them pre-dating ADEA's extension to the State. Under these circumstances, the ADEA has no more connection to remediating Fourteenth Amendment violations than the youth-based protections invalidated in *Oregon v. Mitchell*, the RFRA in *City of Boerne*, the Lanham Act in *College Savings*, or the Patent Remedy Act in *Florida Prepaid*.

A contrary view not only would abandon precedent but also would have no discernible stopping point. Only a most unimaginative legislature would be constrained from using this theory to nationalize all manner of equal protection, procedural due process, substantive due process, or incorporated Bill of Rights' standards — particularly if, as the United States claims (U.S. 40), judicial review of prophylactic section 5 legislation "is as deferential as" review of Article I legislation. No doubt

the Federal government may lead by example in regulating the rights of its own employees, as it eventually did in the ADEA, or even more so, by waiving *its* immunity from State-law anti-discrimination actions filed in State court. But it cannot be the case that congressional self-restraint is in essence the only restriction that the Constitution's "limited and enumerated powers" (*New York v. United States*, 505 U.S. 144, 156 (1992)) place on exercising such broad lawmaking authority over the States.

ARGUMENT

At the outset, it is useful to clarify the parameters of dispute. Neither Florida nor Alabama has challenged Congress's authority under the Interstate Commerce Clause to regulate State employees under the ADEA. *See EEOC v. Wyoming*, 460 U.S. 226 (1983). Nor have they challenged an individual's authority to bring an injunction action against State officials in federal court, *see Ex Parte Young*, 209 U.S. 123 (1908), or the Federal government's authority to bring a claim for injunctive and monetary relief against States in federal court, *see Employees of the Dep't of Public Health and Welfare v. Missouri Public Health Dep't*, 411 U.S. 279, 286 (1973). Neither plaintiffs nor the Federal government has invoked the Spending Clause to justify these actions. Nor have they disputed that Congress may rely only on the Fourteenth Amendment, not the Commerce Clause, to abrogate the States' constitutional immunity from suit. *See Seminole Tribe v. Florida*, 517 U.S. 44, 59 (1996).

What is left is a narrow, though no doubt important, dispute over whether Congress permissibly abrogated the States' immunity from individual money-damages actions. It did not. Before "compel[ling] States to surrender their sovereign immunity," Congress must "'unequivocally express its intent'" to revoke that constitutional right, then establish that it "had the power to" do so. *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 119 S. Ct. 2199, 2201

(1999) (quoting *Seminole Tribe*, 517 U.S. at 55). The ADEA, however, satisfies neither requirement, and accordingly these claims should be dismissed.

I. THE ADEA DOES NOT EXPLICITLY ABROGATE THE STATES' ELEVENTH AMENDMENT IMMUNITY.

Recognizing that "the States' immunity from suit is a fundamental" attribute of "sovereignty," *Alden v. Maine*, 119 S. Ct. 2240, 2246 (1999), and that the immunity is designed to preserve the "constitutional balance between the Federal Government and the States," *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 238 (1985), the Court has not lightly inferred abrogations of it. Only an "intention to abrogate the States' immunity unmistakably clear in the language of the statute" will suffice. *Florida Prepaid*, 119 S. Ct. at 2205 (quotation omitted). Whether stated as an "unmistakably clear" requirement, *Atascadero State Hosp.*, 473 U.S. at 242, as an "unequivocal and textual" requirement, *Dellmuth v. Muth*, 491 U.S. 223, 230 (1989), or merely as a "clear statement" rule, *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 65 (1989) (quotation omitted), the point is the same: Congress must leave no doubt about its intentions.

In purporting to extend the ADEA to the States through the Fair Labor Standards Amendments of 1974, however, Congress simply did not satisfy this "strict standard." *Port Auth. Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 305 (1990). Some components of the 1974 amendment, to be sure, are clear. No doubt Congress extended coverage of the ADEA's substantive provisions to public employers by amending the term "employer" to include "a State or political subdivision of a State and any agency or instrumentality of a State or a political subdivision of a State." *See* Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, § 28(a)(2), 88 Stat. 74 (codified at 29 U.S.C. § 630(b)). And no doubt the amendment permits all employees to "bring a civil action in

any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this Act." 29 U.S.C. § 626(c)(1).

But when it comes to abrogating the States' sovereign immunity, doubt still lingers on several fronts. The first problem is the phrase "any court of competent jurisdiction." In *Employees of the Department of Public Health and Welfare v. Missouri Public Health Department*, the Court addressed whether the FLSA, in Justice Douglas's words, "brought the States to heel, in the sense of lifting their immunity from suit in a federal court." 411 U.S. at 283. Acknowledging "no doubt that Congress desired to bring under the Act" certain State employees, the Court nonetheless concluded that the enforcement provision — "Action to recover such liability may be maintained in any court of competent jurisdiction" (*id.*) — was insufficiently clear to abrogate the States' Eleventh Amendment immunity. Federal court actions were still permissible when pursued by the Federal government, the Court acknowledged, *id.* at 286, and the FLSA might still "permit[ ] suit[s] in the [State] courts," *id.* at 287. But the opaque phrase "any court of competent jurisdiction" did not establish the "clear language that the constitutional immunity was swept away." *Id.* at 285.

Seconding this conclusion is *Kennecott Copper Corp. v. State Tax Comm'n*, 327 U.S. 573, 577-79 (1946), which rejected the same abrogation argument that *Employees* did. There, the Court held that a State's purported waiver of immunity "in any court of competent jurisdiction" did not satisfy these clear-statement requirements. *See also College Savings Bank v. Florida Prepaid Postsecondary Ed. Expense Bd.*, 119 S. Ct. 2219, 2226 (1999) (a State does not "consent to suit in federal court merely by stating its intention to 'sue and be sued,' or even by authorizing suits against it 'in any court of competent jurisdiction'") (citations omitted).

The ADEA contains an identically-worded enforcement provision. As in *Employees* and as in *Kennecott Copper*, it just permits claims in "any court of competent jurisdiction." 29 U.S.C. § 626(c)(1). The provision, then, cannot do for the ADEA what it so clearly failed to do for the abrogation claims in *Employees* or *Kennecott*.

Nor does it change matters that Congress responded to the *Employees* decision by rewording the FLSA in 1974 to say that an action "may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction." 29 U.S.C. § 216(b). Trying to capitalize on an ADEA provision that says "[t]he provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided" in several different subsections of the FLSA, including 29 U.S.C. § 216(b), petitioners argue (U.S. 14-15; Pet. 17-18) that the FLSA-motivated response to *Employees* covers the ADEA as well. They are right that the change is relevant, but the inference they draw from it is exactly backwards.

The proposed interpretation requires a reading of the ADEA that creates *two* court enforcement provisions applicable to the States — the FLSA provision noted above and the still-extant enforcement provision in the ADEA itself, which Congress did not delete in 1974. The simultaneous existence of both provisions, ostensibly for the same statute, sows more doubt than it removes. Far from eliminating the ambiguity left by the perpetuation of the *Employees* language, the existence of another provision referring to federal courts only multiplies the reader's confusion. The side-by-side provisions are inscrutable, and efforts to discern their joint meaning are hardly assisted by the extensive page turning through the United States Code required to bring all of the provisions allegedly bearing on this inquiry — 29 U.S.C. § 626(b) & (c)(1), 29 U.S.C. § 630(b), 29 U.S.C. § 216(b), 29 U.S.C. § 203(x), 29 U.S.C. § 255(d) — together. The two provisions in the end

are still "susceptible of . . . interpretations that do not authorize monetary relief" — for example, that the ADEA incorporates some FLSA provisions but not those expressly covered in the ADEA itself — and that is enough to defeat a claim of abrogation. *United States v. Nordic Village, Inc.*, 503 U.S. 30, 34 (1992).

Add to this ambiguity a second one, and it becomes clear that Congress still has not established the textual specificity that precedent demands. By its express terms, § 216(b) of the FLSA just authorizes federal-court actions "to recover the liability prescribed in either of the preceding sentences" of the subsection. The "preceding sentences," in turn, merely create employer liability for violations of the minimum wage and hour provisions of the FLSA, 29 U.S.C. §§ 206, 207, and for violations of the FLSA's retaliatory discharge prohibition, 29 U.S.C. § 215(a)(3). Even if the FLSA's jurisdictional provision sufficed to abrogate State immunity for these FLSA claims, it is not clear why the ADEA's alleged "incorporation" of this language waives State immunity from other claims, to say nothing of separate ADEA claims. It may be true in other words that § 626(b) of the ADEA incorporates certain "powers, remedies, and procedures" of the FLSA. But that is not to say that each of the many provisions identified in those sections is pertinent to ADEA actions or, worse, that they displace all existing ADEA jurisdictional provisions that Congress itself chose not to delete. Nor does *Seminole Tribe v. Florida* alter this conclusion. Unlike the ADEA, that statute contained "numerous references to the 'State'" in the enforcement provision itself. 517 U.S. 44, 57 (1996).

All of this, however, is prelude to a final flaw in petitioners' arguments. Even an accounting of these various provisions that compels the view that the ADEA generally permits actions against States in federal court does not suffice. As the Court held in *Atascadero*, and "reaffirm[ed]" in *Dellmuth*, "[a] general authorization for suit in federal court is not the kind of

unequivocal statutory language sufficient to abrogate the Eleventh Amendment." 491 U.S. at 231-32 (quoting *Atascadero*, 473 U.S. at 246). The same "imperfect confidence" that *Dellmuth* expressed about abrogation of its jurisdictional provision — one may "bring a civil action . . . in any State court of competent jurisdiction or in a district court of the United States" — deserves equal expression here. As these cases make clear, it is one thing to require States to comply with the substantive provisions of a federal law and to grant a "general authorization for suit in federal court." But it is quite another to grant that authority, then revoke the State's right to assert one of the defenses — sovereign immunity — to those claims. At most, petitioners' contrary arguments (U.S. 12-17; Pet. 14-20) "lend[] force to the inference that the States were intended to be subject to damages actions for violations of the [ADEA]. But such a permissible inference, whatever its logical force, would remain just that: a permissible inference" — not the "unequivocal declaration" that precedent demands. 491 U.S. at 232.

In addition to "assur[ing] that the legislature has in fact faced [the policy], and intended to bring [it] into issue," *Will*, 491 U.S. at 65 (quotation omitted), the clear-statement rule places no great hardship on Congress. "When measured against" Congress's "explicit consideration of abrogation of the Eleventh Amendment" in other laws, the ADEA's "treatment of the question appears ambiguous at best." *Dellmuth*, 491 U.S. at 230. That is particularly true here since Congress has shown its ability to abrogate state immunity scrupulously in another statute barring "discrimination" "on the basis of age." 42 U.S.C. § 6102. Applicable to federally-funded programs, the Age Discrimination Act of 1975 contains precisely the kind of unequivocal abrogation the Court has long demanded. *See* 42 U.S.C. § 2000d-7(a)(1) ("A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973,

title IX of the Education Amendments of 1972, the Age Discrimination Act of 1975, title VI of the Civil Rights Act of 1964 or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance."). *See also* 5 U.S.C. § 296(a) ("Any State . . . shall not be immune, under the eleventh amendment of the Constitution of the United States or under any other doctrine of sovereign immunity, from suit in Federal court . . . for infringement of a patent."); 42 U.S.C. § 12202 ("A State shall not be immune under the eleventh amendment" from a claim under the Americans with Disabilities Act). Congress thus had plenty of guidance as to which provisions are "unequivocal," *see supra*, and which are not, *see Employees*. This one is not, and the Court should so hold.

II. THE ADEA IS NOT APPROPRIATE ENFORCEMENT LEGISLATION UNDER SECTION 5 OF THE FOURTEENTH AMENDMENT.

A. The Section 5 Power Is A Remedial One, And Must Be Exercised In A Way That Is Congruent With And Proportional To Constitutional Wrongs.

"Section 1 . . . No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

U.S. Const. amend. XIV, § 1.

"Section 5. Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

U.S. Const. amend. XIV, § 5.

Section 5 combines a broad power (to pass "appropriate legislation") with a broad limitation on that power (to do so only when "enforc[ing] . . . the provisions of this article"). Consistent with the "design of the Amendment and the text of § 5," *City of Boerne v. Flores* makes clear that the enforcement power is a "remedial" one. 521 U.S. 507, 519 (1997). So do cases decided before *City of Boerne*, *see South Carolina v. Katzenbach*, 383 U.S. 301, 326 (1966) (describing the enforcement power as a "remedial" one), and so do cases decided after it, *see Florida Prepaid*, 119 S. Ct. at 2206 ("Congress' enforcement power is 'remedial' in nature"), *College Savings Bank v. Florida Prepaid Postsecondary Ed. Expense Bd.*, 119 S. Ct. 2219, 2224 (1999) ("the term 'enforce' is to be taken seriously . . . the object of valid § 5 legislation must be the carefully delimited remediation or prevention of constitutional violations").

In accordance with the remedial nature of section 5, judicial review of enforcement legislation "must first identify the Fourteenth Amendment 'evil' or 'wrong' that Congress intended to remedy." *Florida Prepaid*, 119 S. Ct. at 2207 (quoting *City of Boerne*, 521 U.S. at 525); *see Fitzpatrick v. Bitzer*, 427 U.S. 445, 453 (1976) (§ 5 "stand[s] behind," not in front of, the "imperatives" of § 1). The Court then asks whether the legislation merely bans violations of the Fourteenth Amendment as the Court has defined them, or exceeds those strictures in order prophylactically to "remedy" past violations or "prevent" future ones.

Congress has "much deference" (*City of Boerne*, 521 U.S. at 536) in the first respect. In passing legislation that just provides remedies for ongoing State action that itself violates the Fourteenth Amendment, Congress poses no threat to the national separation of powers and specifically "the province of the Judicial Branch . . . to say what the law is," *id.* at 536 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)). Nor, so long as there is some "proportionality" between the underlying violation and the law's remedy, does such legislation threaten the federal separation of powers by "contradict[ing] vital principles necessary to maintain" the "balance" between the States and the National Government. *Id.* Accordingly, whether exercising its right to prohibit State action that violates the Fourteenth Amendment, *see, e.g., Ex Parte Virginia*, 100 U.S. 339 (18[illegible]), to establish a cause of

action for violations of the Amendment, *see* 42 U.S.C. § 1983, or to provide a forum for constitutional claims, *see Strauder v. West Virginia*, 100 U.S. 303 (1879), Congress has broad power to legislate in this regard.

Section 5 legislation that prohibits what the Constitution does not, however, is another matter. Such laws invariably present the twin risks of parliamentarian supremacy, in which the legislature assumes plenary authority to define the outer limits of its own power and plenary authority to bend State sovereign functions to congressional will. Before upholding such legislation, as a result, the Court imposes three requirements: (1) a stated "intent to act under its authority to enforce the Fourteenth Amendment," *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. at 16; (2) a predicate "pattern or practice of unconstitutional conduct," *City of Boerne*, 521 U.S. at 534, *Florida Prepaid*, 119 S. Ct. at 2207; and (3) a "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end," *City of Boerne*, 521 U.S. at 519-20. Ultimately, the "appropriateness of remedial measures must be considered in light of the evil presented. Strong measures appropriate to address one harm may be an unwarranted response to another, lesser one." *Id.* at 530-32.

B. The ADEA Cannot Be Sustained As Traditional Enforcement Legislation That Merely Prohibits Constitutional Violations.

1. Alleged Discrimination Against The Elderly Receives Rational Basis Review.

Not until 1976, two years *after* Congress extended the ADEA to the States, did the Court first address whether alleged discrimination against the elderly might violate the Constitution. *See Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307 (1976). In rejecting an equal-protection challenge to a State law requiring police officers over the age

of 50 to retire, *Murgia* noted that the officers had not been "'relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process,'" *id.* at 313 (quoting *San Antonio Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973)), and thus did not "constitute a suspect class for purposes of equal protection analysis," 427 U.S. at 313. The Court therefore did not review the classification with the "degree of critical examination" that strict scrutiny requires. *Id.* at 314. Instead, it noted that "old age" simply "marks a stage that each of us will reach if we live out our normal span," *id.* at 313, that "physical ability generally declines with age," *id.* at 315, and that "mandatory retirement at 50 serves to remove from police service those whose fitness for uniformed work presumptively has diminished with age," *id.* at 315. Under these circumstances, the Court held that the law "clearly is rationally related to the State's objective." *Id.* The Court noted that the State might have sought to "determine fitness more precisely through individualized testing," but stressed that, where rational basis review is applicable, the State need not act with that degree of precision. *Id.* at 316.

Three years later, in *Vance v. Bradley*, 440 U.S. 93 (1979), the Court reviewed a similar challenge, this time to a federal law that required foreign service officers to retire at age 60. Claimants argued that the requirement was "arbitrary" because it "impose[d] the burden only on those over age 60," and failed to account on a case-by-case basis for "those who are over 60 but quite able to perform." *Id.* at 102-03 n.20. The Court observed at the outset that it was "quite reluctant" to strike laws on this ground. *Id.* at 97.

> The Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch

> has acted. Thus, we will not overturn such a statute unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the legislature's actions were irrational.

Id. at 97 (footnote omitted). Because the claimants could not "demonstrate that Congress has no reasonable basis for believing that conditions overseas generally are more demanding than conditions in the United States and that at age 60 or before many persons begin something of a decline in mental and physical reliability," the Court upheld the law. *Id.* at 111. "'It makes no difference,'" the Court added, "'that the facts may be disputed or their effect opposed by argument and opinion of serious strength. It is not within the competency of the courts to arbitrate in such contrariety.'" *Id.* at 112 (quoting *Rast v. Van Deman & Lewis Co.*, 240 U.S. 342, 357 (1916)).

In the last case in this trilogy, *Gregory v. Ashcroft*, 501 U.S. 452 (1991), addressed a mandatory retirement provision for State judges at age 70. Acknowledging that the "generalization" on which the law was based — that "physical and mental capacity sometimes diminish with age," *id.* at 472 — is "far from true" for all 70-year-old judges, "is probably not true" for "most" judges, and "may not be true at all," the Court nonetheless upheld the provision. *Id.* at 473. The claimants could not establish, the Court held, that the "'facts on which the classification is apparently based could not reasonably be conceived to be true by the . . .decisionmaker,'" and that was enough to defeat the claim. *Id.* at 473 (quoting *Bradley*, 440 U.S. at 111).

Other decisions in other contexts confirm that rational basis review is "a paradigm of judicial restraint," and, where applicable, makes State action "virtually unreviewable" under the Constitution. *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 314 (1993). Under these cases, as under the *Murgia* trilogy itself, it is well settled that courts must "accept a

legislature's generalizations even when there is an imperfect fit between means and ends." *Heller v. Doe*, 509 U.S. 312, 320 (1993); *see, e.g., City of Dallas v. Stanglin*, 490 U.S. 19, 26 (1989) ("'A state does not violate the Equal Protection Clause merely because classifications made by its laws are imperfect.'") (quoting *Dandridge v. Williams*, 397 U.S. 471, 485-86 (1970)). It is equally well settled that, under rational basis review, a "legislature or governing decisionmaker" need not "actually articulate at any time the purpose or rationale supporting its classification," *Nordlinger v. Hahn*, 505 U.S. 1, 15 (1992), as long as there is "any reasonably conceivable state of facts that could provide a rational basis for the classification," *Beach Communications*, 508 U.S. at 313. Accordingly, the actual motive of the decisionmaker "is entirely irrelevant for constitutional purposes." *Id.* at 315; *see Heller v. Doe*, 509 U.S. at 320 ("a legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data"); *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 179 (1980) (constitutionally irrelevant what motive "in fact underlay" challenged government decision). The standard of review, moreover, is no different regardless whether "the classification is drawn by legislative mandate" or "by administrative action." *Nordlinger*, 505 U.S. at 16 n.8; *see also Allegheny Pittsburgh Coal Co. v. Webster County*, 488 U.S. 336, 343-44 (1989).

These decisions make it clear that government rarely if ever violates the Constitution by treating individuals differently on the basis of age. If employment decisions subject to rational basis review need only be justified by *some* rational justification after the fact, *see, e.g., Beech Communications*, 508 U.S. at 313-15; *Nordlinger*, 505 U.S. at 16-18, and if the generalization that "physical and mental capacity sometimes diminish with age" (*Bradley*, 440 U.S. at 111-12) is rational enough to support across-the-board age classifications both in jobs requiring mental acuity (*see*

Gregory, 501 U.S. at 473) and those requiring physical strength (*see Murgia*, 427 U.S. at 314-15), then it is difficult to imagine an act of age discrimination in employment that would rise to the level of a constitutional violation.

2. Judicial Review Under The ADEA Is Far More Rigorous Than It Is Under The Equal Protection Clause.

By any measure, it cannot tenably be argued that the ADEA and the Equal Protection Clause apply the same level of scrutiny to alleged State discrimination against the elderly. According to the Court, legislative and executive branch decisions in this area receive rational-basis review, *Gregory*, 501 U.S. at 473, *Bradley*, 440 U.S. at 97, *Murgia*, 427 U.S. at 313-15, and will not be invalidated unless they are "palpably arbitrary" and no conceivable set of facts supports them, *Nordlinger*, 505 U.S. at 18. Yet, according to Congress's purported efforts to enforce that provision, ADEA requires judicial scrutiny of State action that "is inconsistent with" and "significantly different" from "rational basis" review. *Western Air Lines v. Criswell*, 472 U.S. 400, 421-22 (1985).

Western Air Lines specifically rejects the contention that the two standards are one and the same:

> [The employer] contended below that the ADEA only requires that the employer establish "a rational basis in fact" for believing that identification of those persons lacking suitable qualifications cannot occur on an individualized basis. This "rational basis in fact" standard would have been tantamount to an instruction to return a verdict in the defendant's favor. Because that standard conveys a meaning that is significantly different from that conveyed by the statutory phrase "reasonably necessary," it was correctly rejected by the trial court.

472 U.S. at 421. Accordingly, while "Congress expressly decided that problems involving age discrimination in

employment should be resolved on a 'case-by-case basis' by proof to a jury" under the ADEA, *id.* at 422, application of the rational basis standard carries no such requirement. Indeed, under the constitutional test, a jury's "'inquiry is at an end'" with the "articulation of any 'plausible [reason]' for the employer's decision." *Id. at* 422 n.36 (quoting *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. at 179).

The ADEA in the end cannot be justified on the ground that it merely asks the States to do what the Equal Protection Clause already requires. Far from applying the same standards of care, the two mandates are worlds apart in their substantive rules, allocation of the burden of proof, system of adjudication and ultimate application.

C. The ADEA Is Not "Proper Prophylactic" Legislation.

1. The ADEA's Extra-Constitutional Requirements Cannot Be Justified By A Power That Congress Never Invoked.

Nor is the ADEA a permissible "prophylactic" law that "prohibits conduct which is not itself unconstitutional." *City of Boerne*, 521 U.S. at 518 (citation omitted). As an initial matter, Congress may not rely on section 5 to sustain the ADEA because it never invoked that authority in the text of the statute, or for that matter anywhere else. From 1967 to the present, the ADEA has turned on Congress's Interstate Commerce Clause powers, not those under the Fourteenth Amendment. For this reason alone, the legislature's assertion of authority to condemn what the Constitution does not should be rejected.

Just as the "term 'enforce' is to be taken seriously" in reading section 5, *College Savings*, 119 S. Ct. at 224, so too is the consequence of exercising that authority prophylactically. Unlike the traditional exercise of the enforcement power where Congress merely supplies remedies for what the Fourteenth

Amendment already proscribes, this additional authority turns on Congress's "predicate" judgment that the States have violated the constitutional rights of their citizens or are on the verge of doing so. *Florida Prepaid*, 119 S. Ct. 2210-11. That is a serious charge, and one that the Courts do not, and should not, lightly infer. Because this unique authority "imposes congressional policy on a State involuntarily, and because it often intrudes on traditional state authority," including a state's sovereign immunity, the Court has "not quickly attribute[d] to Congress an unstated intent to act under its authority to enforce the Fourteenth Amendment." *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. at 16. *See id.* at 35-36 (White, J., joined by Brennan & Marshall, JJ., dissenting in part) ("Congressional action under the Enforcement Clause of the Fourteenth Amendment . . . has very significant consequences, and given these ramifications, it should not be lightly assumed that Congress acted pursuant to its power under section 5. Nothing in the statutory language refers to the Fourteenth Amendment.").

The Court's "previous cases are wholly consistent with that view, since Congress in those cases expressly articulated its intent to legislate pursuant to § 5." 451 U.S. at 16 (citing *Katzenbach v. Morgan*, *Oregon v. Mitchell*, and *Fitzpatrick v. Bitzer*). *Dicta* to the contrary in *EEOC v. Wyoming*, 460 U.S. 226, 243 n.18 (1983), is just that, and at all events the decision elsewhere acknowledges the requirement that the Court "be able to discern some legislative purpose or factual predicate that supports the exercise of that power," *id.* Neither requirement, it turns out, has been met here. As the ADEA's statement of findings and purpose reveal, the law represents a paradigmatic exercise of Congress's authority under the Interstate Commerce Clause. *See* 29 U.S.C. § 621(a)(4) ("the existence in industries affecting commerce, of arbitrary discrimination in employment because of age, burdens commerce and the free flow of goods in commerce"). *See also* 8 L. Larson, *Employment Discrimination*, § 121.06[5][b] (2d

ed. 1999) ("[N]owhere does the ADEA make mention of the Fourteenth Amendment, and . . . the ADEA's 1974 Amendments adding state and local governments to the list of liable employers were enacted pursuant to an amendment to [FLSA], which grounds itself in the Commerce Clause."). Unlike the RFRA in *City of Boerne*, the Patent Remedy Act in *Florida Prepaid*, or the Voting Rights Act in *South Carolina* and *Morgan*, the legislative record reverberates with silence concerning section 5, the Fourteenth Amendment or equal protection. While repeated references to interstate commerce dot the legislative landscape, not a single utterance mentions section 5 in general or State violations of equal protection in particular. Petitioners agree (Pet. 29 n.18) that Congress failed to "make any explicit reference to the Fourteenth Amendment" in extending the ADEA to the States. And the United States only casually rebuts the point (U.S. 18 n.18) with a reference to a floor speech by Senator Bentsen, which references a Title VII report, which in turn references among many other things the Fourteenth Amendment. That is inadequate.

Just last Term, *Florida Prepaid* applied this reasoning in declining to consider whether the Patent Remedy Act could be justified on section 5 grounds as an effort to remedy or prevent violations of the Just Compensation Clause. In the Court's words:

> There is no suggestion in the language of the statute itself, or in the House or Senate Reports of the bill which became the statute, that Congress had in mind the Just Compensation Clause of the Fifth Amendment. Since Congress was so explicit about invoking its authority under Article I and its authority to prevent a State from depriving a person of property without due process of law under the Fourteenth Amendment, we think this omission precludes consideration of the Just Compensation Clause as a basis for the Patent Remedy Act.

119 S. Ct. at 2208 n.7.

This rule, and its application here, also make abundant sense. Neither States, their citizens, nor the Congress have anything to gain from hiding alleged State violations of the Constitution. That is all the more true in view of the principal explanation for *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985) — that States protect their self-interest in Congress through the national political process — and in view of the zero-sum reality that Congress's gain under section 5 is invariably the States' sovereign and fiscal loss. Political-process federalism is a two-way street. If the States are expected to protect their sovereign interests in the Halls of Congress, they have every right to know when the National Government believes they have failed to respect the constitutional rights of their citizens. This approach also avoids unnecessary snipe hunts through the legislative history in search of predicate instances of unconstitutional conduct that Congress never searched for in the first instance and that it helps no one suddenly to improvise. Most of all, however, this approach supports the core goal that it is the business of section 5 to advance — to root out and end Fourteenth Amendment violations. Nothing about a *sotto voce* exercise of this remedial authority serves that essential end.

2. The ADEA Does Not Respond To A "Predicate" Pattern, Or Even A Single Threat, Of Unconstitutional State Action.

"[P]roper prophylactic section 5 legislation" also must fairly anticipate or "respond to a history of 'widespread and persisting deprivation of constitutional rights.'" *Florida Prepaid*, 119 S. Ct. at 2210 (quoting *City of Boerne*, 521 U.S. at 526). The ADEA, however, does no such thing. Whether one considers *prior* equal protection violations or potential *future* ones, the congressional record is conspicuously silent in either direction.

No pattern of prior State violations exists. A brief review of the text and legislative record of the ADEA confirms that it

does not even pretend to "respond" to State action, to say nothing of unconstitutional State action, but instead turns entirely on Article I policy concerns. One searches in vain for even a murmur of the "predicate unconstitutional conduct that Congress intended to remedy" by extending the ADEA to the States in 1974. *Florida Prepaid*, 119 S. Ct. at 2210.

Far from reflecting State insensitivity to the equal protection rights of their citizens, the legislative record of the ADEA "acknowledg[es] that 'states are willing and able to respect [the employment] rights'" of the elderly. *Florida Prepaid*, 119 S. Ct. at 2207. Indeed, Congress first looked to State age-discrimination statutes as guidance for enacting the ADEA in 1967. "As part of the preparation for" its 1965 report on age discrimination, "a conference of State administrators of age discrimination laws was convened by the Secretary of Labor, in September 1964, to see their views on the effectiveness of such legislation." *See* Report of the Secretary of Labor, *The Older American Worker: Age Discrimination in Employment,* 9-10 (1965), *reprinted in* Equal Employment Opportunity Comm. (EEOC), *Legislative History of the Age Discrimination in Employment Act,* 16-41 (1981), (hereinafter "*Older American Worker*"). During debates over the law, the legislature repeatedly applauded the success of State age-discrimination laws:

* "I am confident that just as the 14 States have found ways to adequately enforce their State laws barring discrimination in hiring practices because of age, so can the Department of Labor set up adequate procedures under the title." 110 Cong. Rec. 2598 (1964) (statement of Rep. Pucinski); *see id.* at 2597;

* The 1965 report by the Secretary of Labor acknowledged that "[a]rbitrary age discrimination is significantly reduced in States which have strong laws, actively administered, directed against discrimination based on age." *Older American Worker,* at 9;

* "The Secretary's report set forth the scope and complexity of the problem, concluded that it can be solved, and cited the success of State laws against age discrimination in employment." 112 Cong. Rec. 20821 (1966);

* "20 States and Puerto Rico already have laws on the books prohibiting discrimination in employment because of age. I am informed that these laws have been extremely successful in broadening job opportunities for older workers." 112 Cong. Rec. 20820 (1966);

* "State experience with statutes prohibiting discrimination in employment on the basis of age indicates that such practice can be reduced by a well-administered and well-enforced statute, coupled with an educational program." S. Rep. No. 89-1487, at 47 (1966) (joint statement of Senators Javits, Prouty, Murphy and Griffin);

* "There are now 24 States which have age discrimination legislation of the type proposed" in the federal legislation, and "[t]he overall reaction to the laws is favorable." H.R. Rep. No. 90-805, at 2 (1967); S. Rep. No. 90-723, at 2 (1967) (same).

Not surprisingly, when it came to extending the ADEA to the States in 1974, Congress did not suddenly begin criticizing the States' treatment of their elderly citizens. Instead, the legislature continued to acknowledge the growing number of States that banned age discrimination. *See* Senate Special Comm. on Aging, *Improving the Age Discrimination Act: A Working Paper*, 93d Cong., 1st Sess. 37 (1973) (statement of Secretary of Labor Willard Wirtz) (noting "26 States and Puerto Rico which have laws relating to age discrimination"); 118 Cong. Rec. 24397 (1972) ("some 31 States have some form of age discrimination law") (statement of Sen. Bentsen); *see* Appendix. Congress also "found that strong State laws, when actively administered, reduce arbitrary discrimination against middle-aged and older people, enabling them to be considered more frequently for vacant positions." Senate

Special Comm. on Aging, *Improving the Age Discrimination Act: A Working Paper*, 93d Cong., 1st Sess. 9 (1973).

Aside from looking to the States for guidance regarding initial passage of the ADEA and aside from complimenting the State age-discrimination provisions, the decision to extend the ADEA to the States in 1974 turned on little legislative discussion about State employment practices. The bulk of the 1974 amendment process instead concerned Congress's modifications to the FLSA and its extension of the FLSA to the States. Just one section of the 29-section Act, it turns out, concerned the ADEA. *See* Pub. L. No. 93-259; *see also* 120 Cong. Rec. 8762-64 (1974). And of the leading Senate and House Reports, just eight of 515 pages concerned the ADEA. *See* S. Rep. No. 92-842, at 45-46 (1972); S. Rep. No. 93-300, at 56-57 (1973); S. Rep. No. 93-690, at 55-56; H.R. Rep. No. 93-913, at 40-41 (1974).

To the extent that Congress gave any explanation for extending the ADEA to the States, the legislature said that it was "a logical extension of the Committee's decision to extend the FLSA coverage to Federal, State, and local government employees," S. Rep. No. 93-690, at 55 (1974); H.R. Rep. No. 93-913, at 40 (1974), or that "employees of State and local governments are entitled to the same benefits and protections in equal employment as the employees in the private sector of the economy," 118 Cong. Rec. 15895 (1972) (statement of Sen. Bentsen) (quoting Senate Report). Either way, these are self-evidently Interstate Commerce Clause, not Fourteenth Amendment, concerns. *See Florida Prepaid*, 119 S. Ct. at 2210-11 (goal of "plac[ing] States on the same footing as private parties" is a "proper Article I," not section 5, "concern[]").

Much of the 1974 legislative record, linked as it was to the FLSA amendments, refers to Congress's interstate commerce powers. The Senate Report, for example, said that "there is no doubt that the activities of public sector employers affect

interstate commerce and therefore that the Congress may regulate them pursuant to its power to regulate interstate commerce." S. Rep. No. 93-690, at 24. *See also id.* at 22; H.R. Rep. No. 93-913, at 2. And of course the statement of findings and purpose of the 1967 law, which was not altered in 1974, explicitly referred to interstate commerce. *See* 29 U.S.C. § 621(a)(4) ("the existence in industries affecting commerce, of arbitrary discrimination in employment because of age, burdens commerce and the free flow of goods in commerce"). Nothing about the 1974 amendments suddenly and silently changed the ADEA's 1967 foundation in the Interstate Commerce Clause.

In the face of this congressional record, it is difficult to credit the United States' contention that Congress exercised "a special legislative competence" (U.S. 22) in making "empirical conclusions" (U.S. 10) regarding State violations of the constitutional rights of their citizens over the age of 40. No such record exists. Moreover, there was nothing "empirical" about this Court's legal conclusion that age discrimination in employment is generally not unconstitutional. *See, e.g.*, *Bradley*, 440 U.S. at 108-09. The United States's suggestion that Congress could permissibly conclude otherwise (U.S. 27-29) is a thinly-veiled contention that Congress may, under section 5, expand the substantive scope of the Constitution. *City of Boerne*, however, plainly forecloses that contention. *See* 521 U.S. at 516-29.

Nor does it change matters (U.S. 29-39; Pet. 28-36) that the ADEA findings say that the law will "prohibit arbitrary age discrimination in employment," 29 U.S.C. § 621(b), or that the legislative record contains several references to "arbitrary" discrimination against the elderly. Not one of the references to "arbitrary" employment practices refers to State governments or for that matter even to the Federal government. They all refer to private employment practices or to employment practices generally. Nor, to the extent the

legislature meant to use the term in its constitutional sense, could Congress credibly have made any such finding. Whether one looks to the United States Reports or the Federal Reporter in 1967, 1974, even today, no such violations have been shown.

Just as importantly, this is "purely a semantical dispute." *Griffin v. United States*, 502 U.S. 46, 58-59 (1991). It is one thing to show that employment practices violate the arbitrariness minimums of the Constitution; it is quite another to say that certain practices are arbitrary as a matter of policy. "The answer to petitioner's objection is simply that [Congress was] using [arbitrary] in the latter sense." *Id.* at 59. The context of each remark illustrates the point. Most of the references to arbitrary practices, including all of those in the text of the ADEA, stem from the 1967 legislation, when Congress could not possibly have been referring to unconstitutional conduct, as the law applied only to private employers. During the 1967 legislative debate, one Senator went so far as to say that "age discrimination is not prohibited in the Constitution," S. Rep. No. 90-723, at 15 (statement of Sen. Dominick), while during the 1974 debate another Senator said that "[t]he passage of this measure insures that Government employees will be subject to the same protections against arbitrary employment based on age as are employees in the private sector," 120 Cong. Rec. 8768 (1974) (statement of Sen. Bentsen). Petitioners' references to the term "arbitrary" in the legislative record all illustrate the policy-driven, not constitutional, nature of this usage.

Also unavailing is petitioners' reliance (U.S. 29-39; Pet. 30-32) on sporadic references in the legislative record to alleged governmental discrimination against the elderly. None of the references concerns unconstitutional conduct. Most of the references relate to discrimination by the Federal government, *see, e.g.*, 118 Cong. Rec. 7745 (1972); S. Rep. No. 93-846 (1974), including a special report on the issue labeled

Cancelled Careers: The Impact of Reduction-in-Force Policies on Middle-Aged Federal Employees, Senate Special Comm. on Aging, 92d Cong., 2d Sess (1972). *See also* Senate Special Comm. on Aging, *Improving the Age Discrimination Law* , 93d Cong., 1st Sess. (Comm. Print 1973). And the few references to State government do not even have rhetorical value, to say nothing of section 5 value. In a floor speech in 1972, Senator Bentsen suggests that there is "mounting evidence that employees of Federal, State and local governments" face discrimination. 118 Cong. Rec. 7745 (1972). But the only evidence he mentions regarding the States, "mounting" or otherwise, is that "[l]etters from my own State have revealed that State and local governments have also been guilty of discrimination toward older employees." *Id.* That is it. Not only are these "fleeting references" (*Florida Prepaid*, 119 S. Ct. at 2209) few and far between, but because Senator Bentsen did not place the letters in the record, they do not even clarify whether the identified conduct violates equal protection.

Later congressional debates over the ADEA make matters worse. Instead of identifying studies demonstrating the remedial nature of the ADEA, subsequent changes confirm the substantive, non-remedial scope of the law. In 1978, the legislature extended the protected class of employees from 40-65 to 40-70 and made it more difficult for State and private employers to maintain mandatory age guidelines. The change, however, plainly did not respond to unconstitutional State action, but to a decision of this Court.

The House Committee on Aging in particular was critical of the Court's 1976 *Murgia* decision. It observed that while the decision "does not close the door completely to successful constitutional attacks on mandatory retirement in the courts . . . the likelihood of success is very bleak." House Select Comm. on Aging, 95th Cong., 1st Sess., *Mandatory Retirement: The Social and Human Cost of Enforced Idleness* 38 (Comm. Print

1977). The Committee then disagreed with *Murgia*'s decision not to elevate age to a suspect class, noting that "[f]rom the evidence presented, the committee concludes that 'age' should be as protected a classification as race and sex." *Id.* Leaving no doubt about the target of the 1978 amendment, the discussion ended with the coda: "If mandatory retirement because of age — the final step in the practice of age discrimination — is not to be declared unconstitutional by the Courts, then Congress should act to make such a practice illegal." *Id.* While such sentiments may support Interstate Commerce Clause legislation, they do not reflect the "specially informed *legislative* competence" that section 5 entrusts to Congress, *Katzenbach v. Morgan*, 384 U.S. 641, 656 (1966) (emphasis added), and utterly disrespect the inter-branch imperative that "it is this Court's precedent," not Congress's view of that precedent, "which must control." *City of Boerne*, 521 U.S. at 536. "Congress does not enforce a constitutional right by changing what the right is." *Id.* at 519.

No threat of future violations exists. Nor does the future look any more threatening than the past. To our knowledge, Congress nowhere expressed any such concern, whether in the text of the law or in the legislative record. Nor can any such threat be contrived today, as the United States goes a long way to admitting when it acknowledges (U.S. 43) that the "States have largely abolished mandatory retirement ages and other across-the-board uses of age in most employment matters."

Besides being governed by democratically-elected officials sworn to uphold the Constitution of the United States, States all have laws or administrative provisions restricting age discrimination. *See* Appendix. These provisions go beyond what the Constitution requires, they each apply generally to public employees, and they each permit monetary relief. *See* Appendix. It may be that a fertile legal mind can still posit an instance of State conduct that violates equal protection — because it "is so unrelated to the achievement of any

combination of legitimate purposes," *Bradley*, 440 U.S. at 97 — but that does not violate State law. Such hypothetical risks, however, cannot possibly constitute the kind of "threat" that triggers Congress's "prophylactic" section 5 power.

Still less is that possible when one considers not just the remedies provided by the 50 State laws but the whole panoply of remedial options that an allegedly beleaguered State employee would have. Today, only the most exceptional alignment of misfortune would allow a constitutional violation to go unremedied: (1) The State or Federal lower courts would have to deny relief on equal protection grounds; (2) this Court would have to deny relief on equal protection grounds; (3) the State courts would have to deny relief under their own Constitution; (4) the States would have to deny judicial or administrative relief under State law; (5) the States would have to decline to waive immunity to ADEA claims in State court; (6) the federal courts would have to deny *Ex Parte Young* relief under ADEA in federal court; (7) the Federal Government would have to choose not to sue the State under ADEA for money damages in federal court; and (8) the "Constitution['s] presum[ption] that . . . even improvident decisions will eventually be rectified by the democratic process," *Bradley*, 440 U.S. at 97, would have to fail. No doubt, anything may happen. But if it did under this sequence of events, State recalcitrance to the dictates of the Constitution would hardly be the reason.

All things considered, in "enacting the [ADEA amendments], Congress identified no pattern of [age discrimination] by the States, let alone a pattern of constitutional violations." *Florida Prepaid*, 119 S. Ct. at 2207. Whether one looks backward in time or forward, in neither direction is there a pattern, practice, even an isolated threat, of unconstitutional State action against the elderly. Congress in the end did not unearth a single shard of State misconduct. The only real evidence is of States over-protecting the constitutional rights

of the elderly, not undermining them. The legislative record, as in *Florida Prepaid* and *City of Boerne*, "contains no evidence that unremedied [age discrimination] by States had become a problem of national import." *Florida Prepaid*, 119 S. Ct. at 2207-08. The predicate of prophylactic section 5 legislation in short is missing, and for this reason alone ADEA's extra-constitutional requirements exceed Congress's Fourteenth Amendment authority.

3. The ADEA Independently Fails The Proportionality Requirements Of Section 5.

Even if the condition of State misconduct could somehow be established, the ADEA would still exceed congressional power. The law is "so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior." *City of Boerne*, 521 U.S. at 532.

The ADEA's application to the States carries one hallmark after another of unvarnished policy-based legislation, as opposed to calibrated remedial legislation. For starters, the law applies in equal measure to State and private employers, 29 U.S.C. § 630(b), even though the Fourteenth Amendment covers the former but not the latter. Above and beyond their separate oath to obey the Constitution, public employers accountable to the ballot box (including many voters over the age of 40) operate under different economic and social pressures from private employers accountable to dividend-anxious shareholders. It blinks at reality to assume that the employment risks in the one setting apply equally to the other, as Congress presumably realized in making the ADEA applicable only to private employers in 1967. Paradoxically, however, federal mandatory retirement guidelines have not always applied similarly to State and local mandatory retirement guidelines under the ADEA, even though equal protection *does* cover both sets of workers. *See Johnson v. Mayor & City of Baltimore*, 472 U.S. 353 (1985) (Federal law

requiring federal firefighters to retire at age 55 did not establish that comparable provision for city firefighters complied with the ADEA).

As with the Patent Remedy Act, the law also is of "indefinite" duration. *Florida Prepaid*, 119 S. Ct. at 2210. Unlike the voting rights measures previously approved by the Court, the ADEA does not require the legislature to assess in a remedial manner the progress States are making in curing or ending allegedly unconstitutional practices, *City of Boerne*, 521 U.S. at 532-33. The law also "expansive[ly]" covers every form of government employment and applies to virtually every government worker over the age of 40, as opposed "to limit[ing] the coverage of the Act to cases involving arguable constitutional violations." *Florida Prepaid*, 119 S. Ct. at 2210. Even AARP, a most vigilant protector of the rights of the elderly and an *amicus curiae* in this case, does not offer benefits to individuals until age 50.

Above all else, however, "it simply cannot be said that 'many of [the State employment actions] affected by the congressional enactment have a significant likelihood of being unconstitutional.'" *Florida Prepaid*, 119 S. Ct. at 2210 (quoting *City of Boerne*, 521 U.S. at 532). The rigorous standard of review applicable to an ADEA action has no parallel to the forgiving standard that the Court applies to equal protection claims.

Take the review applicable to mandatory retirement laws. Under the Equal Protection Clause, *Gregory* teaches that such laws may rest on the "generalization" that "physical and mental capacity sometimes diminish with age," 501 U.S. at 472, that such laws must be upheld even when the generalization "may not be true at all," *id.* at 473, and that such laws will be upheld so long as the claimant is unable to establish that the "'facts on which the classification is apparently based could not reasonably be conceived to be true by the . . . decisionmaker,'" *id.* (quoting *Bradley*, 440 U.S. at

111). The ADEA, however, specifically outlaws such generalizations, "requir[ing] the State to achieve its goals in a more *individualized* and careful manner than would otherwise be the case." *EEOC v. Wyoming*, 460 U.S. at 239 (emphasis added). The very fact that Wyoming's age-55 retirement law for its Game and Fish Department continued under the ADEA to be litigated in *EEOC v. Wyoming*, some 7 years after the Court upheld a similar guideline in *Murgia*, is evidence enough that the two standards of care are disproportionate. *See EEOC v. Wyoming*, 460 U.S. at 260-61 (Burger, C.J., dissenting) ("Were we asked to review the constitutionality of [this law], we would reach a result consistent with *Bradley* and *Murgia*."). Any lingering doubt on this score is removed by the 1978 ADEA amendments, which in the aftermath of *Murgia* tried to make it "quite clear that the policies and substantive provisions of the Act apply with especial force in the case of mandatory retirement provisions." *Western Air Lines, Inc. v. Criswell*, 472 U.S. at 410. *See also* House Select Comm. on Aging, 95th Cong., 1st Sess., *Mandatory Retirement: The Social and Human Cost of Enforced Idleness* 38 (1977) ("Congress should act to make such a practice illegal" when the Court will not).

Consider next the different defenses available to States in Fourteenth Amendment and ADEA claims. Constitutional claims withstand scrutiny unless the basis for the varying treatment "could not reasonably be conceived to be true by the . . . decisionmaker," *Gregory*, 501 U.S. at 473 (quoting *Bradley*, 440 U.S. at 111), which frequently is "tantamount to an instruction to return a verdict in the defendant's favor," *Criswell*, 472 U.S. at 421. Under the ADEA, however, differential treatment is only permitted "where age is a bona fide occupational qualification [BFOQ] *reasonably necessary* to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age." 29 U.S.C. § 623(f)(1) (emphasis added). The BFOQ defense is "one of 'reasonable necessity,' not reasonableness,"

Criswell, 472 U.S. at 419, and represents "'an extremely narrow exception to the general prohibition' of age discrimination contained in the ADEA." *Id.* at 412 (quoting *Dothard v. Rawlinson*, 433 U.S. 321, 334 (1977)).

ADEA litigation thus contrasts with rational-basis litigation at every turn: (1) The ADEA requires individual "case-by-case" determinations, 472 U.S. at 411 (quoting H.R. Rep. No. 805, 90th Cong., 1st Sess., 7 (1967)), not "generalization[s]" about a class of employees, *see Gregory*, 501 U.S. at 473; (2) it frequently places the burden of proof on the State to justify differential treatment, *see Criswell*, 472 U.S. at 416 n. 24 (citing 46 Fed. Reg. 47727 (1981), 29 C.F.R. § 1625.6(b) (1984)), not the claimant, *Murgia*, 427 U.S. at 314; (3) it requires an "objective justification in a court of law," 472 U.S. at 419, not a justification that could "reasonably be conceived to be true," *Bradley*, 440 U.S. at 111, and that "[i]t is not within the competency of the courts to arbitrate," *id.* at 112 (quotation omitted); (4) it requires in the context of public safety justifications "that there is no acceptable alternative which would better advance it or equally advance it with less discriminatory impact," *Criswell*, 472 U.S. at 416 n.24 (quoting 29 C.F.R. § 1625.6(b)), not the recognition that the State need not choose the "best means to accomplish this purpose," *Murgia*, 427 U.S. at 316; and (5) it permits mandatory age laws for State law enforcement at age 55, 29 U.S.C. § 623(j)(1)(B), not at age 50, *see Murgia*, 427 U.S. at 308. What is more, with the EEOC's blessing, 29 C.F.R. 1625.7(d), the ADEA has been used in these actions and others to bring disparate-impact claims against the States, which the United States does not defend as a proportionate exercise of section 5 power and which petitioners only faintheartedly (Pet. 33 n. 20, 43-44 & n.26) defend. As these outcome-dispositive distinctions make clear, the ADEA has no more connection to the requirements of the Fourteenth Amendment than RFRA did in *City of Boerne* or than the Patent Remedy Act did in *Florida Prepaid*.

What the ADEA does have compelling parallels to is the standard of review applicable to race, gender, religion, and ethnicity discrimination. The language of the ADEA, it turns out, is not the language of rational-basis review, but the language of Title VII. The substantive provisions of the two laws are virtually identical. *Compare* 29 U.S.C. § 623(a)(1) ("to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age") *with* 42 U.S.C. § 2000e-2(a)(1) ("to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin"). And the substantive defenses are identical as well. *Compare* 29 U.S.C. § 623(f)(1) ("reasonably necessary to the normal operation of the particular business") *with* 42 U.S.C. § 2000e-2(e) (same).

An identical burden-shifting framework also applies to each claim. Even when no direct evidence of age discrimination exists, as in a Title VII case, the burden of proof still shifts to the employer under ADEA if the plaintiff can show (1) that he belongs to the protected group, (2) he is qualified for the position, (3) he was rejected, and (4) after his rejection, the position remained open and the employer continued to seek applications from persons of plaintiff's qualifications. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). At that point, the burden then shifts to the employer to articulate a legitimate nondiscriminatory reason for its decision. *Board of Trustees of Keene State College v. Sweeney*, 439 U.S. 24, 25 (1978) (per curiam). The existence of a rational basis for the employer's decision has no place in the analysis. Instead, in the context of public safety justifications, the State must show "that there is no acceptable alternative which would better advance it or equally advance

it with less discriminatory impact," *Criswell*, 472 U.S. at 416 n.24 (quoting 29 C.F.R. § 1625.6(b)). *Compare Murgia*, 427 U.S. at 316 (State need not choose the "best means to accomplish" its "purpose").

Congress ultimately placed age-based classifications, which are presumptively constitutional, on a par with race-based classifications, which presumptively are not. As in *City of Boerne*, the ADEA simply replaces one level of judicial scrutiny with another, and does so out of all proportion to any real or threatened constitutional wrongs. For this independent reason, the law exceeds Congress's section 5 authority.

D. The Conclusion That The ADEA Exceeds Congressional Power Fits Well Within The Court's Section 5 Holdings, And Preserves Vital Principles Of Federalism.

Not just the language of this Court's section 5 precedents, but the holdings as well, establish that the ADEA does not constitute proper enforcement legislation. Even with respect to the central evils addressed by the Civil War Amendments — race and voting — the Court has long required congressional authority to be linked to actual or empirically-threatened violations of the underlying amendment. Common sense and logic ought to suffice to reject the paradoxical exercise of a prophylactic power in an unprophylactic setting. But if not, precedent does. No holding of the Court supports the exercise of prophylactic authority under section 5 in the context of rights that warrant only rational-basis review.

Nearly 30 years ago, in *Oregon v. Mitchell*, 400 U.S. 112 (1970), the Court confirmed that Congress does not have "a substantive, non-remedial power under the Fourteenth Amendment," *City of Boerne*, 521 U.S. at 527, and did so in the context of a non-suspect age-based preference. A majority of the court concluded that Congress exceeded its section 5 authority in passing legislation designed to protect the young

by lowering the minimum age of voters from 21 to 18 in State and local elections. *See* 400 U.S. at 125 (opinion of Black, J.); *id.* at 154, 209 (opinion of Harlan, J.); *id.* at 294, 296 (opinion of Stewart, J., joined by Burger, C.J., and Blackmun, J.). Contrary to the United States' suggestion (U.S. 21), the Court has not upheld prophylactic section 5 legislation designed to "prohibit classifications that were subject merely to rational basis scrutiny." Rather, *Fitzpatrick v. Bitzer*, 427 U.S. 445, addressed only whether section 5 legislation could abrogate Eleventh Amendment immunity, as the State did not otherwise argue that the "substantive provisions of Title VII as applied here are not a proper exercise of congressional authority under § 5 of the Fourteenth Amendment," *id.* at 456 n.11. And *Maher v. Gagne*, 448 U.S. 122 (1980), did not involve an effort to place extra-constitutional requirements on the States at all but only the question whether attorney fees could be permitted in cases involving Fourteenth Amendment claims. Nor does it follow that Congress is "disable[d]" (U.S. 23) from acting in a rational-basis setting. The context just makes it far more difficult to enact prophylactic laws, as opposed to laws that merely vindicate constitutional violations.

Even in the context of fundamental rights, *City of Boerne*, *Florida Prepaid*, and *College Savings* all invalidated legislation that did not respond to a record of constitutional violations and that was disproportionate to any alleged harm. While the defenders of RFRA, as here and as in *Florida Prepaid* and *College Savings*, argued that it was "a reasonable means of protecting the free exercise of religion," and was designed "[t]o avoid the difficulty of proving such violations," *City of Boerne*, 521 U.S. at 529, the Court nonetheless concluded that the law exceeded congressional power. The decision in the *Civil Rights Cases*, 109 U.S. 3 (1883), is to the same effect, noting that section 5 "cannot properly cover the whole domain of rights appertaining to life, liberty and property, defining them and providing for their vindication.

That would be . . . to make Congress take the place of the State Legislatures and to supersede them." *Id.* at 13.

The Court's voting rights decisions all point in the same direction. They each involved patterns and practices of unconstitutional State action, and therefore properly allowed Congress to impose calibrated extra-constitutional requirements on the States. *See, e.g., South Carolina v. Katzenbach*, 383 U.S. at 309 (law was enacted in response to "an insidious and pervasive evil which had been perpetuated in certain parts of our country through unremitting and ingenious defiance of the Constitution" and that prior remedies had been "unsuccessful"); *Katzenbach v. Morgan*, 384 U.S. at 653-54 (literacy test ban "was merely legislation aimed at the elimination of an invidious discrimination in establishing voter qualifications"); *Ex Parte Virginia*, 100 U.S. 339 (permitting civil rights legislation applied to a State trial court judge who excluded jurors on account of race); *Oregon v. Mitchell*, 400 U.S. at 131-34 (literacy tests) (Black, J., writing for Court) (noting "long history" of discriminatory use of literacy tests); *id.* at 216-17 (Harlan, J., concurring) (sufficient evidence of racial discrimination with literacy tests); *id.* at 282-84 (Stewart, J., concurring, joined by Blackmun, J. and Burger, C.J.) ("nationwide application may be reasonably thought appropriate when Congress acts against an evil such as racial discrimination which in varying degrees manifests itself in every part of the country"); *City of Rome v. United States*, 446 U.S. 156 (1980) (same).

In contrast, a decision upholding the prophylactic exercise of section 5 power in the context of rational-basis scrutiny, with no underlying constitutional violations to boot, would break new ground and do little "to allay lingering concerns about the extent of the national power." *Alden v. Maine*, 119 S. Ct. 2240, 2247 (1999). Such authority simply has no stopping point. Virtually any federal law that is itself rational could fairly be said to curb the risk of irrational State

lawmaking in the area. With respect to the "life, liberty or property" guarded by procedural due process, only self-restraint would stand in the way of the national government legislating a more appropriate "process" for State governments to follow. *Civil Rights Cases*, 109 U.S. at 13.

As for other rights incorporated through the due process clause, the risks may be even greater. What would prevent Congress from passing legislation regulating all encounters between State law enforcement and the citizenry in the name of protecting Fourth and Fifth Amendment rights? What would prevent property rights advocates from expanding this Court's "regulatory takings" case law, *see Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978)? What would prevent federal laws nationalizing a system of punishments in the name of protecting Eighth Amendment rights? And what would prevent the federalization of education, marriage and family laws in the name of protecting privacy and other substantive due process guarantees? Indeed, under this expansive theory, it is not clear how *City of Boerne*, *Florida Prepaid*, *College Savings* and *Oregon* would still be good law or why the Court's landmark decisions in *Lopez v. United States*, *Seminole Tribe v. Florida*, *New York v. United States* and *Alden v. Maine* would not be a prophylactic step from irrelevance. The invitation to start down this precipitous path should be rejected.

CONCLUSION

For the foregoing reasons, the States of Florida and Alabama respectfully urge the Court to hold that the ADEA does not permissibly abrogate their immunity from suit.

Respectfully submitted,

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APPENDIX

STATE AGE DISCRIMINATION LAWS

	ALABAMA	ALASKA
Applicable to Public Employers	YES Ala. Admin. Code r. 670-X-4-.01,* Ala. Code § 25-1-20, et seq.**	YES Alaska Stat. § 18.80.300(4)
Applicable to Public Employers Before 1974	NO	NO
Monetary & Equitable Relief	YES r. 670-x-4-.03	YES § 18.80.110 § 18.80.130
Punitive Damages	Not determined	NO 836 P.2d (Alaska 1991)
Attorney Fees	Not determined	YES § 18.80.130(2)(e)
Agency Enforcement	YES r. 670-x-4-.01	YES § 18.80.060
Forbids Unlawful Practices Specified in ADEA	YES r. 670-x-4-.01	YES § 18.80.220, § 18.80.260

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* Not applicable to university employees; the University of Montevallo Grievance Procedure covers age discrimination.

** The Alabama Supreme Court has not yet determined whether it applies to public employees.

	ARIZONA	ARKANSAS
Applicable to Public Employers	YES Ariz. Rev. Stat. Ann. § 41-1461(6)	YES Ark. Code. Ann. § 21-3-201
Applicable to Public Employers Before 1974	NO	NO
Monetary & Equitable Relief	YES § 41-1481(G)	YES § 21-9-203(a)
Punitive Damages	Not determined	Not determined
Attorney Fees	YES § 41-1481(J)	Not determined
Agency Enforcement	YES § 41-1402	NO
Forbids Unlawful Practices Specified in ADEA	YES § 41-1463 § 41-1464	YES § 21-3-203

	CALIFORNIA	COLORADO
Applicable to Public Employers	YES Cal. Government Code § 12926(d)	YES Colo. Rev. Stat. Ann. § 24-34-401(3)
Applicable to Public Employers Before 1974	YES Cal. Labor Code § 1420.1 et seq.	NO
Monetary & Equitable Relief	YES § 12970	YES § 24-34-306 § 24-34-405
Punitive Damages	Not determined	Not determined
Attorney Fees	YES § 12965(b)	NO 38 Colo. App. 286 (Colo. Ct. App. 1976)
Agency Enforcement	YES § 12935	YES § 24-34-305
Forbids Unlawful Practices Specified in ADEA	YES § 12941 66 Cal. Rptr.2d 888 (Cal. 1997)	YES § 24-34-402 906 P.2d 66 (Colo. 1995)

	CONNECTI-CUT	DELAWARE
Applicable to Public Employers	YES Conn. Gen. Stat. Ann. § 46a-51(10)	YES Del. Code Ann. title 19 § 710(3)
Applicable to Public Employers Before 1974	YES Conn. Gen. Stat. § 46a-51 et seq. (renumbered from § 31-122 et seq.)	YES Del. Code Ann. title 19 § 710 et seq.
Monetary & Equitable Relief	YES § 46a-86 § 46a-90	YES § 712
Punitive Damages	NO 201 Conn. 350 (Conn. 1986)	Not determined
Attorney Fees	Not determined	YES § 712(j)
Agency Enforcement	YES § 46a-54	YES § 712
Forbids Unlaw-ful Practices Specified in ADEA	YES § 46a-60	YES § 711 § 718

	FLORIDA	GEORGIA
Applicable to Public Employers	YES Fla. Stat. Ann. § 760.02(6) § 112.044(2)(a)	YES Ga. Code. Ann. § 45-19-22(5)
Applicable to Public Employers Before 1974	YES § 112.044	NO
Monetary & Equitable Relief	YES § 760.11	YES § 45-19-38
Punitive Damages	YES § 760.11 * not against State	NO § 45-19-38(d)
Attorney Fees	YES § 760.11	YES § 45-19-38(c) 211 Ga. App. 134 (Ga. Ct. App. 1993)
Agency Enforcement	YES § 760.06	YES § 45-19-27
Forbids Unlaw-ful Practices Specified in ADEA	YES § 760.10	YES § 45-19-29 § 45-19-30 § 45-19-31 § 45-19-44

	HAWAII	IDAHO
Applicable to Public Employers	YES Haw. Rev. Stat. Ann § 378-1	YES Idaho Code § 67-5902(6)(b)
Applicable to Public Employers Before 1974	NO	NO
Monetary & Equitable Relief	YES § 378-5	YES § 67-5908
Punitive Damages	YES § 368-17(a)	YES § 67-5908(3)(e)
Attorney Fees	YES § 378-5	NO 129 Idaho 234 (Idaho Ct. App. 1996)
Agency Enforcement	YES § 368-3	YES § 67-5906
Forbids Unlawful Practices Specified in ADEA	YES § 378-2	YES § 67-5909, § 67-5911

	ILLINOIS	INDIANA
Applicable to Public Employers	YES 775 Ill. Comp. Stat 5/1-103(L)	YES § 22-9-2-1 (but does not apply to any entity covered by the ADEA) Ind. Code. Ann. § 22-9-2-1 et seq.
Applicable to Public Employers Before 1974	YES Ill. Rev. Stat. 1975, ch. 48 §§ 881-887	YES Ind. Code. Ann. § 22-9-2-1 et seq.
Monetary & Equitable Relief	YES § 5/8A-104	YES 724 F. Supp. 599 (N.D. Ind. 1989)
Punitive Damages	Not determined	Not determined
Attorney Fees	YES § 5/8A-104(G)	Not determined
Agency Enforcement	YES § 5/7A-101	YES § 22-9-2-5
Forbids Unlawful Practices Specified in ADEA	YES § 5/2-102, § 5/6-101	YES § 22-9-2-2, § 22-9-2-8 724 F. Supp. 599 (N.D. Ind. 1989)

	IOWA	KANSAS
Applicable to Public Employers	YES Iowa Code Ann. § 216.2(7)	YES Kan. Stat. Ann. § 44-1112(d).
Applicable to Public Employers Before 1974	YES Iowa Code Ann. § 216.1 et seq. (renumbered from § 105A.2 et seq.)	NO
Monetary & Equitable Relief	YES § 216.5(4) § 216.15	YES § 44-1115 § 44-1005(k)
Punitive Damages	NO 554 N.W.2d 532 (Iowa 1996)	NO 231 Kan. 763 (Kan. 1982)
Attorney Fees	YES § 216.15(8)(a)(8)	Not determined
Agency Enforcement	YES § 216.5	YES § 44-1003 et seq., § 44-1115
Forbids Unlawful Practices Specified in ADEA	YES § 216.6, § 216.11	YES § 44-1113

	KENTUCKY	LOUISIANA
Applicable to Public Employers	YES Ky. Rev. Stat. Ann. § 344.010(1)	YES La. Rev. Stat. Ann. § 23: 311(B)
Applicable to Public Employers Before 1974	NO	NO
Monetary & Equitable Relief	YES § 344.230 § 344.450	YES § 51:2261 § 23:313
Punitive Damages	NO 625 S.W.2d 852 (Ky. 1981)	NO 709 So. 2d 277 (La. Ct. App. 1998)
Attorney Fees	YES § 344.450	YES § 23:313
Agency Enforcement	YES § 344.180	YES § 51:2231(C)
Forbids Unlawful Practices Specified in ADEA	YES § 344.040 § 344.080 § 344.280	YES § 23:312

	MAINE	MARYLAND
Applicable to Public Employers	YES Me. Rev. Stat. Ann. title 5 § 4553(7)	YES Md. Code Ann., Labor & Employment § 49B-15(b)
Applicable to Public Employers Before 1974	YES Me. Rev. Stat. Ann. title 5 § 4551 et seq.	YES Md. Code Ann. art. 49B-1 et seq.
Monetary & Equitable Relief	YES title 5 § 4612 title 5 § 4613	YES § 49B-11
Punitive Damages	YES *not against State title 5 § 4613	NO § 49B-11(e)
Attorney Fees	YES title 5 § 4614	Not determined
Agency Enforcement	YES title 5 § 4612(4)	YES § 49B -9A
Forbids Unlawful Practices Specified in ADEA	YES title 5 § 4572	YES § 49B-16

	MASSACHUSETTS	MICHIGAN
Applicable to Public Employers	YES Mass. Gen Laws Ann. ch. 151B § 1(5), ch. 151B § 4(1C)	YES Mich. Comp. Laws § 37.2103(g)
Applicable to Public Employers Before 1974	YES Mass. Gen. Laws ch. 151B § 1 et seq.	YES Mich. Comp. Laws § 37.2101 et seq.
Monetary & Equitable Relief	YES ch. 151B § 5	YES § 37.2605
Punitive Damages	YES (up to 3 times actual) ch. 151B § 9	Not determined
Attorney Fees	YES ch. 151B § 5	YES § 37.2605(2)(i), § 37.2802
Agency Enforcement	YES ch. 151B § 3	YES § 37.2601
Forbids Unlawful Practices Specified in ADEA	YES ch. 151B § 4	YES § 37.2202 § 37.2701 § 37.2206

	MINNESOTA	MISSISSIPPI
Applicable to Public Employers	YES Minn. Stat. Ann. § 363.01(28)	YES Miss. Code Ann. § 25-9-149 (1992)
Applicable to Public Employers Before 1974	NO	NO
Monetary & Equitable Relief	YES § 363.071	YES § 25-9-131, § 25-9-132
Punitive Damages	YES § 363.071(2)	Not determined
Attorney Fees	YES § 363.071(7)	NO
Agency Enforcement	YES § 363.05	YES § 25-9-131
Forbids Unlawful Practices Specified in ADEA	YES § 363.03	YES § 25-9-149

	MISSOURI	MONTANA
Applicable to Public Employers	YES Mo. Ann. Stat. § 213.010(7)	YES Mont. Code. Ann. § 49-3-201
Applicable to Public Employers Before 1974	NO	NO
Monetary & Equitable Relief	YES § 231.075 § 213.076 § 213.111	YES § 49-2-506 § 49-2-503
Punitive Damages	YES § 213.076(4) § 213.111	NO § 49-2-506(2)
Attorney Fees	YES § 213.076 § 213.111	YES § 49-2-505(7) § 49-2-509(6)
Agency Enforcement	YES § 213.030	YES § 49-2-501 et seq.
Forbids Unlawful Practices Specified in ADEA	YES § 213.055 § 213.070	YES § 49-3-201(1) §§ 49-2-301 to 303

	NEBRASKA	NEVADA
Applicable to Public Employers	YES Neb. Rev. Stat. § 48-1002(2), § 48-1010 (1993)	YES Nev. Rev. Stat. § 613.310(5) § 281.370
Applicable to Public Employers Before 1974	NO	YES § 281.370 § 613.310
Monetary & Equitable Relief	YES § 48-1009 § 48-1007	YES § 233.170(4)(b) § 233.180 § 613.420
Punitive Damages	Not determined	NO § 233.170(6)
Attorney Fees	YES § 48-1120(6)	Not determined
Agency Enforcement	YES § 48-1007	YES § 613.405
Forbids Unlawful Practices Specified in ADEA	YES § 48-1004 503 N.W.2d 211 (Neb. 1993)	YES § 613.330 § 613.340

	NEW HAMPSHIRE	NEW JERSEY
Applicable to Public Employers	YES N.H. Rev. Stat. Ann. § 354-A:2(VII) (1997)	YES N.J. Stat. Ann. § 10:3-1, § 10:5-5(e) § 54:14-11
Applicable to Public Employers Before 1974	YES § 354-A:1 et seq.	YES § 10:5-1 et seq. § 52:14-11
Monetary & Equitable Relief	YES § 354-A:21(II)(d) § 354-A:5(XIV) § 354-A:22(II)	YES § 10:5-17 § 10:5-13 146 N.J. 645 (1995)
Punitive Damages	Not determined	YES § 10:5-17 (treble damages) 868 F.2d 558 (N.J. 1989)
Attorney Fees	YES § 354-A:21(II)(f)	YES § 10:5-27.1
Agency Enforcement	YES § 354-A:5	YES § 10:5-6
Forbids Unlawful Practices Specified in ADEA	YES § 354-A:7 § 354-A:19	YES § 10:3-1 § 10:5-12

	NEW MEXICO	NEW YORK
Applicable to Public Employers	YES N.M. Stat. Ann. § 28-1-2(A)	YES N.Y. Exec. Law § 290 et seq. 620 N.Y.S.2d 407 (1994)
Applicable to Public Employers Before 1974	YES § 28-1-1 et seq.	YES § 290 et seq.
Monetary & Equitable Relief	YES § 28-1-11(E) § 28-1-13(D) § 28-1-4 § 28-1-10(H)	YES § 297(4)(c) § 297(6)
Punitive Damages	NO 110 N.M. 323 (1990)	NO § 297(4)(c)(iv) 53 N.Y.2d 492 (N.Y. 1981)
Attorney Fees	YES § 28-1-11(E) § 28-1-13(D)	NO 1996 WL 808066 (N.Y.Sup. Dec. 17, 1996)
Agency Enforcement	YES § 28-1-4	YES § 295
Forbids Unlawful Practices Specified in ADEA	YES § 28-1-7	YES § 296

	NORTH CAROLINA	NORTH DAKOTA
Applicable to Public Employers	YES N.C. Gen. Stat. § 126-16 (1999) N.C. Gen. Stat. § 143-422.1 et seq.	YES N.D. Cent. Code § 14-02.4-02(5) § 34-01-17
Applicable to Public Employers Before 1974	NO	YES § 34-01-17
Monetary & Equitable Relief	YES § 126-37	YES § 14-02.4-20
Punitive Damages	Not determined	Not determined
Attorney Fees	YES § 126-41	YES § 14-02.4-20
Agency Enforcement	YES § 126-36 § 143-422.3 § 43B-391	YES § 14.02-4-19 § 14.02-4-21
Forbids Unlawful Practices Specified in ADEA	YES § 126-16 § 126-17 § 126-36	YES § 14-02.4-02(4) § 14-02.4-03 § 14-02.4-06 § 14-02.4-18

	OHIO	OKLAHOMA
Applicable to Public Employers	YES Ohio Rev. Code Ann. § 4112.01(A)(2)	YES Okla. Stat. Ann. title 25, 1201(5)
Applicable to Public Employers Before 1974	NO	NO
Monetary & Equitable Relief	YES § 4112.02(N); 653 F.Supp. 1184 (S.D. Ohio 1986)	YES § 1505 § 1502.1
Punitive Damages	YES § 4112.02(N) 84 Ohio St. 3d 417 (1999)	Not determined
Attorney Fees	YES § 4112.05 § 4112.14	YES § 1505 § 1506.8
Agency Enforcement	YES § 4112.04	YES § 1501
Forbids Unlawful Practices Specified in ADEA	YES § 4112.02	YES § 1302, § 1305 § 1306, §1601

	OREGON	PENNSYLVANIA
Applicable to Public Employers	YES Or. Rev. Stat. § 659.010(6)	YES 43 Pa. Cons. Stat. Ann. § 954(b)
Applicable to Public Employers Before 1974	YES § 659.010 et seq.	YES § 951 et seq.
Monetary & Equitable Relief	YES § 659.070 § 659.050(2) § 659.060(3) § 659.121(1)	YES § 959(f)(1) § 962(b)(3) § 959.2
Punitive Damages	NO 298 Or. 76 (1984)	YES 930 F. Supp. 194 (E.D. Pa. 1996)
Attorney Fees	YES § 659.121	YES § 959(f.1) § 962(c.2)
Agency Enforcement	YES § 659.100	YES § 957
Forbids Unlawful Practices Specified in ADEA	YES § 659.015 § 659.030	YES § 955

	RHODE ISLAND	SOUTH CAROLINA
Applicable to Public Employers	YES R.I. Gen. Laws § 28-5-7.1, § 28-5-6(6)	YES S.C. Code Ann. § 1-13-30(d)
Applicable to Public Employers Before 1974	YES § 28-6-1 et seq. (repealed 1980)	YES § 1-13-10 et seq. (renumbered from § 1-360.21 et seq.)
Monetary & Equitable Relief	YES § 28-5-24 § 28-5-29	YES § 1-13-90(c)(16)
Punitive Damages	YES § 28-5-29.1	Not determined
Attorney Fees	YES § 28-5-24	YES 466 F. Supp. 1234 (D.S.C. 1979)
Agency Enforcement	YES § 28-5-13	YES § 1-13-70
Forbids Unlawful Practices Specified in ADEA	YES § 28-5-7	YES § 1-13-80

	SOUTH DAKOTA	TENNESSEE
Applicable to Public Employers	YES S.D. Codified Laws § 3-6A-15	YES Tenn. Code Ann. § 4-21-102(4)
Applicable to Public Employers Before 1974	YES § 3-6A-15	NO
Monetary & Equitable Relief	YES § 3-6A-15 § 22-6-2	YES § 4-21-307 § 4-21-311(b) § 4-21-303(g) § 4-21-305
Punitive Damages	YES Violation is a criminal misdemeanor	NO 954 S.W. 2d 34 (Tenn. 1997)
Attorney Fees	Not determined	YES § 4-21-306(a)(7) § 4-21-311(b)
Agency Enforcement	Not determined	YES § 4-21-202
Forbids Unlawful Practices Specified in ADEA	YES § 3-6A-15	YES § 4-21-301 § 4-21-401 § 4-21-502

	TEXAS	UTAH
Applicable to Public Employers	YES Tex. Labor Code. Ann. § 21.002(8), § 21.126	YES Utah Code Ann. § 34A-5-102(7)(a)
Applicable to Public Employers Before 1974	YES Dep't of Labor, report submitted to Congress, Age Discrimination in Employment Act of 1967 (1972)	NO
Monetary & Equitable Relief	YES § 21.258 § 21.2585	YES § 34A-5-107(9)
Punitive Damages	YES § 21.2585(a)(2)	Not determined
Attorney Fees	YES § 21.125 § 21.259	YES § 34A-5-107(9)
Agency Enforcement	YES § 21.003	YES § 34A-5-104
Forbids Unlawful Practices Specified in ADEA	YES § 21.051 § 21.054 § 21.055 § 21.059	YES § 34A-5-106

	VERMONT	VIRGINIA
Applicable to Public Employers	YES Vt. Stat. Ann. title 21 § 495d(1) (1988) title 3 § 1001	YES Va. Code Ann. § 2.1-116.06
Applicable to Public Employers Before 1974	YES title 3 §1001	NO
Monetary & Equitable Relief	YES § 495b(b) title 9 § 2458, § 2461	YES § 2.1-116.07(B)
Punitive Damages	YES title 9 § 2461(b)	Not determined
Attorney Fees	YES § 495b(b) title 9 § 2461(b)	YES § 2.1-116.07(D)
Agency Enforcement	NO § 495b	YES § 2.1-116.14
Forbids Unlawful Practices Specified in ADEA	YES § 495	YES § 2.1-116.06

	WASHINGTON	WEST VIRGINIA
Applicable to Public Employers	YES Wash. Rev. Code § 49.60.040(1)	YES W. Va. Code § 5-11-3(d)
Applicable to Public Employers Before 1974	YES § 49.60.010 et seq.	YES § 5-11-1 et seq.
Monetary & Equitable Relief	YES § 49.60.250 129 Wash. 2d 572 (1996)	YES § 5-11-10 § 5-11-13 174 W. Va. 711 (1985)
Punitive Damages	NO 129 Wash. 2d 572 (1996)	Not determined
Attorneys Fees	YES § 49.60.250(9)	YES § 5-11-13(c)
Agency Enforcement	YES § 49.60.120	YES § 5-11-8
ForbidsUnlaw-ful Practices Specified in ADEA	YES § 49.44.090 § 49.60.180 § 49.60.210	YES § 5-11-9

	WISCONSIN	WYOMING
Applicable to Public Employers	YES Wis. Stat. Ann. § 111.32(6)(a)	YES Wyo. Stat. Ann. § 27-9-102(b)
Applicable to Public Employers Before 1974	NO	NO
Monetary & Equitable Relief	YES § 111.39(c)	YES § 27-9-106(g)
Punitive Damages	Not determined	Not determined
Attorney Fees	YES 643 F.2d 445 (7th Cir. 1981)	Not determined
Agency Enforcement	YES § 111.39	YES § 27-9-104
Forbids Unlaw-ful Practices Specified in ADEA	YES § 111.321 § 111.322	YES § 27-9-105